

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28

CS CONSTRUCTION, INC.

Employer

And

Case 28-RC-080331

OPERATIVE PLASTERERS' AND  
CEMENT MASON'S INTERNATIONAL  
ASSOCIATION, LOCAL 394

Petitioner.

**PETITIONER'S ANSWERING BRIEF**

Petitioner, Operative Plasterers' and Cement Mason's International Association, Local 394 (hereinafter "the Union") hereby submits its answering brief in opposition to the exceptions filed by the Employer, CS Construction, Inc. ("CS" or "the Employer").

CS raises two very general exceptions to the Hearing Officer's Report and Recommendations on the Challenged Ballot ("Hearing Officer's Report"). First, CS contends that the Hearing Officer erred in concluding that the stipulated election agreement did not "reveal the objective intent of the parties and the employees whom the parties intended to include." Hearing Officer's Report, pp. 7-8. In its second exception, the Employer contends that the Hearing Officer erred in failing to find that the four challenged employees were dual function employees.

The Union submits that the Hearing Officer's findings and conclusions were consistent with the evidence, his determinations as to the credibility of witnesses, and prevailing Board law. The Report should be accepted, the exceptions should be overruled, and a certification should issue forthwith.

Because the issues raised by CS in its exceptions were extensively briefed by the Union in its post-hearing brief, in the interest of avoiding duplication and preserving the Union's resources, the Union will simply adopt and incorporate by reference Petitioner's Post-Hearing Brief ("Union Brief"), a copy of which is attached as Exhibit A.

The Union will undertake herein to supplement the Union Brief to the extent necessary to address issues raised in the Employer's exceptions.

## **I. SUMMARY OF FACTS.**

The Union and CS Construction, Inc. ("CS") had a collective bargaining relationship for more than three decades. The most recent agreement ran from July 1, 2009 through June 30, 2012. The agreement covers cement masons, also referred to as cement finishers. It provides for an exclusive hiring hall and the wage and benefit package which includes contributions to multi-employer pension, health and welfare, and apprenticeship funds. PX1,<sup>1</sup> pp.46-57.

At the time the contract expired, there were three cement masons working for CS. Prior to the expiration of the agreement, the Employer informed the Union that it would not renew the contract, that it was repudiating the collective bargaining relationship and that it believed the agreement was an 8(f) agreement, not a 9(a) agreement. The Union responded by filing the instant petition. T. 43,46-47.

The parties were able to work out a stipulated election agreement. The agreement described the appropriate unit as:

Included:	All full-time and regular part-time cement masons and finishers employed by the Employer in the State of Arizona.
Excluded:	All other employees, clerical employees, maintenance employees, foremen, general foremen, superintendents, managerial employees, guards, and supervisors as defined in the Act.

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<sup>1</sup> Reference to Board Exhibits; Joint Exhibits, Petitioner Exhibits and Employer Exhibits shall be to "BX", "JX", "PX", and "EX" respectively. Reference to the reporter's transcript is to "T", followed by an appropriate page number.

Hearing Officer's Report, p.2.

The election was conducted on June 13, 2012. Four employees classified by the Employer as "traffic signal technicians" voted in the election subject to challenge by the Union. The Union challenged the ballots on the basis that the employees had not been referred through the Union, and they were laborers who did not share a community of interest with the cement masons and finishers who were covered under the expiring collective bargaining agreement. Hearing Officer Report, p.2. Well after entering into the stipulated election agreement, the Union learned that CS operated two distinct divisions, a concrete structures division and a traffic signal and lighting division. Those divisions had entirely different management, supervision, wage, and benefit structures, and a complete lack of interchange between employees in the respective divisions. T, 1132-1139. Well after entering into the stipulated election agreement, the Union learned that employees classified as traffic signal technicians or laborers performed a myriad of functions in connection with the installation of street lights, signals and signs, including excavation, laying of pipe and conduit, operation of heavy equipment, connecting electrical systems, and minor concrete finishing work on small platforms and pedestals upon which the lights, signs and signals were mounted. T, p. 52-53, 59, 145-152, 255.

Moreover, as the Hearing Officer correctly found, the Employer did not intend, at the time the election stipulation was reached, to include anyone other than the cement finishers who were working under the terms of the expired collective bargaining agreement: Caesar Retaina, Raphael Polanco and Omar Puebla. CS decided to include the traffic division employees, Jerme Hill, Carl Perkins, Craig Potts and Carlos Moreno at or about the time it prepared the Excelsior List. Hearing Officer's Report, pp. 8-9; T. p. 140, 186-187.

The Hearing Officer properly concluded that the parties did not intend to include the traffic signal technicians in the bargaining unit because the Union had no knowledge that they existed and because the Employer recognized that the cement masons for whom the Union had petitioned were those performing work in the concrete structures division.

## II. ARGUMENTS

- a) Exception No. 1 should be overruled because of a complete lack of community of interest between the cement masons and the traffic signal specialists.

The Hearing Officer properly applied the three-pronged test set forth in *Caesar's Tahoe*, 337 NLRB at 1096 (2002) to determine whether the parties intended to include the traffic signal technicians in the unit. He appropriately concluded that there was no evidence of an objective intent on the part of either party to include the traffic signal specialists in the cement mason bargaining unit. Hearing Officer's Report, pp.7-8. The Hearing Officer determined that it was necessary to consider extrinsic evidence in order to ascertain the parties' intent at the time they agreed to the stipulated election agreement. He found the Employer's admission that it did not consider the traffic service technicians to be part of the bargaining unit at the time the stipulation was entered into and the Union's business manager's testimony that he had no knowledge of the existence of those employees to be conclusive evidence of the parties' intention not to include the traffic signal technicians in the unit.

Finally, moving on to the third prong of the *Caesar's Tahoe* test, the Hearing Officer examined the factors which showed absolutely no community of interests between the cement finishers in the concrete structures division and the traffic signal technicians in the traffic signal and lighting division. He considered the autonomous nature of the two divisions, the separate divisional management and supervision, the absence of any interchange of employees between the divisions and the stark differences in wages, benefits and working conditions. Hearing

Officer's Report, pp. 7-11. See also, Union's Brief, pp. 9-12 for a discussion of the application of the *Caesar's Tahoe* tests to the facts of this case.

The Hearing Officer's Report as it relates to Exception 1 should be adopted by the Board because he applied appropriate legal authority to what are essentially undisputed facts. CS has presented no substantial issues of fact or law which should dissuade the Board from adopting the Hearing Officer's Report in its entirety. The evidence presented at the hearing plainly shows that the four employees working as traffic signal technicians should not be included in the cement masons' bargaining unit.

- b) Exception No. 2 should be overruled because the challengees were not dual function employees.

Based upon the evidence demonstrating a complete lack of community of interest, the Hearing Officer concluded that, because the employees did not share "a substantial community of interest with full-time employees in the bargaining unit . . . The absence of community – of – interest between the four employees in question, and the bargaining unit employees renders further inquiry into the dual-function unnecessary as the former is a requisite of the latter."

Hearing Officer's Report, p.12.

Moreover, the Union's brief contains a comprehensive discussion as to why the challengees did not perform enough cement masons work or possess the same level of skills as the employees in the concrete structures division to be considered dual-function employees.

Rudimentary concrete finishing work constituted only a small fraction of the work performed by the traffic signal technicians, they worked on small jobs, and they did not possess the same level of skills as the cement masons in the concrete finishing division. See discussion at pp. 12-15 of the Union Brief.

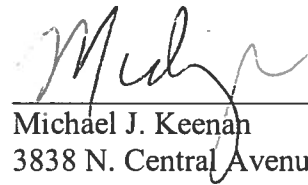
The Hearing Officer's recommendation that Exception 2 be overruled should be adopted by the Board.

### III CONCLUSION

For all the foregoing reasons, the Union respectfully requests that the Board adopt the findings, legal conclusions, and recommendations of the Hearing Officer, that the challenges be upheld, and that a certification issue as soon as possible.

Respectfully submitted this 5<sup>th</sup> day of September, 2012.

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### CERTIFICATE OF MAILING

I hereby certify that on the 5<sup>th</sup> day of September, 2012, I emailed and mailed via U.S. Postal Service the foregoing to the following:

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## **EXHIBIT A**



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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CS CONSTRUCTION, INC.

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OPERATIVE PLASTERERS' AND  
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Petitioner.

**PETITIONER'S POST-HEARING BRIEF**

Petitioner, Operative Plasterers' and Cement Mason's International Association, Local 394 (hereinafter "the Union") hereby submits its post-hearing brief concerning the challenged ballots of employees Carlos Moreno, Craig Potts, Carl Perkins and Jerney Hill.

**I. INTRODUCTION.**

The Union and the Employer, CS Construction, Inc. ("CS") have had a collective bargaining relationship spanning more than three decades. In May of 2012, CS announced that it was repudiating and ending the relationship with the Union asserting to the Union that the expiring agreement was a §8(f) agreement. The Union then filed the instant petition to validate the parties' longstanding §9(a) relationship.

After the parties entered into a stipulated election agreement describing the unit as "all full-time and regular part-time cement masons and finishers employed by the Employer in the state of Arizona," CS added four employees, who were not full or part-time cement masons/finishers, to the *Excelsior* list. The Union challenged their ballots on the ground that

those employees were not full- time or regular part-time cement masons, that they did not share a community of interest with the bargaining unit cement masons, and that, to the extent that the employees performed rudimentary cement mason functions, they did so on a sporadic basis for only a small portion of their workday.

## **II. STATEMENT OF FACTS**

### **a) Background.**

The Union and CS have had a longstanding collective bargaining relationship. The most recent agreement had as its term the period July 1, 2009 through June 30, 2012.

PX1.<sup>1</sup> The agreement provides for an exclusive hiring hall by which all employees performing cement masons/cement finisher work (the terms are used synonymously) must be secured through the Union's hiring hall. PX1, pp. 46-51. CS utilized the hiring hall on many occasions. At the time the petition was filed, it had three cement finishers on its payroll who had been referred from the Union hall: Cesar Ratana, Raphael Polanco, and Omar Rivera Puebla, all journeyman cement finishers. PX2. Messrs. Hill, Moreno, Perkins and Potts were not dispatched through the Union's hiring hall.

The collective bargaining agreement also required CS to make hourly contributions on behalf of all employees performing work of the type covered under the collective bargaining agreement to the Cement Masons Local 394 for Pension Trust Fund, the Cement Masons Local 394 Joint Apprenticeship and Training Fund, and the Southwest Multi-Craft Health & Welfare Fund. For the past several months, contributions were only made on behalf of Messrs. Polanco, Ratana and Puebla, and never on behalf of Hill, Moreno, Potts and Perkins. PX3, PX1, pp.52-57.

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The Union maintains a Department of Labor approved apprenticeship program in which apprentices are taught all aspects of the cement finisher trade including blueprint reading, mathematics, use of various hand tools and power tools, patching, finishing and color applications, among others. In order to complete the apprenticeship program, apprentices must log 6,000 hours of on-the-job training and 18 classes per year for three years. T.38-40,

The cement finisher trade involves leveling and finishing concrete through the use of a number of hand and power tools. Employees are proficient at striking off or rodding concrete, leveling concrete with various aluminum or wooden leveling devices. They then use screeds to compact the concrete. On some jobs they will tamp the concrete to push rocks toward the bottom. They will then use either manual or power bull floating machines, bump cutters and fresnos to further level the concrete. They will use tool joints, edging tools and saw cutting tools as well as various types of trowels to finish and edge the concrete. They are also involved with curing and patching concrete structures. They must determine the appropriate grade and make sure the concrete is within applicable specifications. T12-32.

Messrs. Polanco, Ratana and Puebla are all journeyman cement finishers who are proficient in all of the aspects of the cement finisher trade. They typically work with carpenters, who build and strip forms, and laborers who assist with the movement of the concrete, operate the concrete pumps and otherwise assist the concrete finishers as assigned. T83-86.

The cement finishers work independently, with very little direction from supervisors. T94. They sometimes direct laborers to help with simple troweling and other functions when they are shorthanded. Typically this involves the performance of low skilled jobs under the direction of a cement finisher. T90-100.

The journeymen cement masons typically work on large structural concrete jobs including bridges, box culverts, retaining walls, foundations, sidewalks, and other large structures which require the finishing of concrete. T.132-135.

b) CS Divisional Structure

The Union learned at the hearing that CS maintains two distinct, autonomous divisions: the Concrete Structures Division and the Traffic Signal and Lighting Division ("Traffic Division"). The Concrete Structures Division, headed by division manager Zack Teegarten, performs work on bridges, box culverts, retaining walls, foundations, sidewalks, and "anything reasonably large and made of concrete." T132-134. That division also employs an operations manager and several superintendents who oversee the day to day work of employees within the division. T138-139.

Employees in the Concrete Structures Division are covered under collective bargaining agreements with the Carpenters' Union, the Operating Engineers Union and Cement Masons Local 394. Teegarten explained that the employer follows the craft lines and requirements under the collective bargaining agreement for work performed under the auspices of his division. T245, BX3-4. Teegarten acknowledged that CS followed contractual and customary craft lines. For example, Carpenters are responsible for setting forms more than 14" high, but cement finishers can set shorter forms if directed to do so by the Employer. T264, 272-273.

The Traffic Division, also known as Division 3, performs work on traffic lights and signals, street lighting and highway signs. T137-138.

The Traffic Division has a completely separate set of supervisors, an entirely different wage and benefit structure and the need for an entirely different set of skills. The employees, referred to by Teegarten as "Traffic Signal Technicians" and referred to by employee Jerney

Hill as “laborers” ( “I was hired as a laborer and I work as a laborer”) are involved in the process of installing street lights, signals and signs from the excavation stage through the installation of pipe, conduit and fiber optics, the operation of heavy equipment, connecting electrical systems, form building, concrete pouring, and minimal and incidental finishing of small platforms and pedestals supporting the lights, signs and signals. T145-152, 255.

Teegarten provided hearsay testimony, over the objection of the Union, to the effect that there was an “understanding” many years ago that the collective bargaining agreements would not apply to employees in the Traffic Division because of the multi-faceted nature of their work. T152-153. The bottom line is that, for the past several years, CS has not applied the terms of its collective bargaining agreements to employees in the Traffic Division. T.284-285.

c) Concrete Work Performed by Hill, Moreno, Potts and Perkins

Jermey Hill, Carl Perkins, Craig Potts and Carlos Moreno were all hired as laborers to perform the many functions involved in the installation of traffic signals, lights and signs. They were hired by supervisors in the Traffic Division, they worked only in that division, they never interacted with employees in the Concrete Structures Division and they received wages and benefits substantially different from those of Polanco, Puebla and Retana, who were receiving the contract rate of \$22.85 at the time the petition was filed. T. 173-175, 445. Perkins was receiving \$20.00 per hour, Hill: \$22.00; Moreno: \$23.00; and, Potts: \$23.00. JX1.

The employees working in the Concrete Structures Division also received employer contributions of \$4.25 to the retirement fund, \$4.00 to the Health & Welfare fund (for full family coverage), and \$.32 to the Apprenticeship fund. PX1, p.29-30, T46. By contrast, the employees in the Traffic Division participated in a different medical plan, which required employees to pay part of their hourly wage for individual health coverage. In Hill’s case, the employee’s share of

health and dental benefits amounted to \$87.64 per week. T46, 254. CS maintains a 401(k) plan, available to Traffic Division employees who make wage deferrals. CS matches a portion of any employee wage deferral. T255.

It is undisputed that employees in the Traffic Division were never intermingled with employees in the Concrete Structures Division, that they were separately supervised and that they received an entirely different level of wages and benefits. T284-285.

One of the many aspects of the Traffic Division laborer job involves "concrete work." According to the Employer's own definition of concrete work includes "the excavation, placement of conduit, stub out, setting of cage, anchor bolts, forming, pouring, finishing & striping of the foundation." PX9. As noted, the job of a cement finisher involves limited building of forms (under 14"), finishing, curing and patching of concrete. The record reflects, to the extent the Traffic Division laborers performed concrete finishing functions, they were incidental to the overall installation of lights, signs and signals, they involved very small structures, and they involved non-precise and, in some cases, non-existent finishing work. T. 151, 213, 244, 314-316.

The pedestals were approximately 3' in diameter. While the pour might involve up to 30' of concrete poured into a form, the actual finishing work was rough and very superficial. According to Union business manager, Tom Hardie, who has worked in virtually all phases of the industry, a typical finishing job on pedestals and platforms for electrical boxes, involves some vibrating (laborer work), a couple of swipes of the trowel, and some minimal edging. T314-315.

The work done by traffic signal laborers on sidewalks and handicap ramps is also relatively unskilled, and of short duration. T316. Hardie compared the skills of the traffic signal

laborers to the concrete structures finishers to be that of a second period apprentice (traffic signal) to a full charge journeyman (concrete structures). T317-318.

Jermey Hill, who has been working as a laborer in the Traffic Division for nearly 5 years, acknowledged that the jobs were small, that they involved primarily hand tools, and that there was no need for more skilled function such as operating power equipment, looking out for and repairing hot spots, and patching. T210-213, 235.

Hill estimated that he spent 2-5 hours per week performing pouring and finishing work. He did not delineate between the amount of time spent pouring concrete (excavating, building forms and shoveling or pumping concrete) to that spent actually finishing the concrete. T222. CS did not present evidence refuting Hardie's contention that the actual finishing involved a very small area and a very short period of time.

Traffic Division employees report their time on payroll forms. On federally funded Davis-Bacon jobs, they designate the type of work which they are performing on any given day (i.e. equipment operator, electrician or "concrete worker"), and the number of hours on which they performed each task. On non-Davis-Bacon jobs, they simply include the accounting codes for the type of work which they were performing. Any concrete work (as broadly defined by the company) fell within the 10030 code. PX9; T177, 186, 243.

Hill testified that he was not able to tell from the payroll records how much time he spent on concrete finishing tasks. Teegarten spent a considerable amount of time testifying about how unreliable the payroll records were in showing the type of work or the amount of time spent on particular functions. T268-269, 281.

Teegarten testified that he had no firsthand knowledge of what employees were doing or how long it took them to perform particular functions. Based upon his review of payroll reports

and hearsay reports from supervisors, he concluded that Hill, Potts, Moreno and Perkins were working “at least four hours per week” performing concrete functions. T149. He later claimed that the employees were spending as much as 20% of their time on concrete work. T270, 278.

The employees’ payroll records tell another story. Hill testified that he performed concrete pouring and finishing for two to five hours per week (between 5 and 13%). Payroll records for Moreno, Perkins and Potts for the three month period prior to the filing of the petition (March through June, 2012) reflect that Perkins spent up to 19% of his time performing concrete functions (those designated as “concrete workers” or “T/S Laborer”. PX8, pp. 66-75. Craig Potts spent approximately 14% of his time performing “concrete work”. PX6, pp. 59-75. Carlos Moreno spent only 11% of his time performing work under the general designation of concrete TX7, pp.62-78.

Significantly, both Hill and Teegarten repeatedly pointed out that the work done by traffic division laborers involved small projects, did not involve the use of sophisticated tools and equipment, and did not involve some of the more advanced skills of a cement finisher, such as locating and repairing hot spots. T151, 284-285, 209-211, 235.

d) Stipulated Election Agreement

The parties stipulated that the appropriate unit for the election was “all full-time and regular part-time cement masons and finishers employed by the Employer in the state of Arizona”. JX2. However, at the time the stipulation was entered into, Hardie had no knowledge that there were employees in a separate division, who had not been dispatched or reported to the Union and its’ benefit funds, who were allegedly performing incidental, rudimentary concrete finishing work. Teegarten acknowledged that the decision to include the Traffic Division laborers came well after the agreement was entered into, when the Employer was putting



together its *Excelsior* list. He said that, at the time CS entered into the election agreement, he did not intend to include any specific individuals within the definition of concrete finisher. T186-187. He also pointed out that “the obvious ones” to be included in the unit were “my concrete finishers” dispatched through the Union. T140.

The Traffic Division laborers were clearly not part-time employees. They were full-time employees, a minor portion of whose regular job duties included some incidental and rudimentary concrete finishing work.

### III. ARGUMENTS

- a) At the time the election stipulation was reached, there was no agreement to include the Traffic Division laborers.

We anticipate that CS will attempt to show that the Traffic Division laborers are “dual-function employees” entitled to vote in the election. The standard for determining whether an employee should be included in the unit as a dual-function employee was first articulated in *Berea Publishing Co.*, 140 NLRB 516, 518-519 (1963). An employee must regularly perform duties similar to those performed by unit employees “for sufficient periods of time to demonstrate a substantial interest in working conditions in the bargaining unit.”

Before commencing that analysis, in the case of a stipulated bargaining unit, the Board requires application of the three pronged test described in *Caesar’s Tahoe*, 337 NLRB 1096 (2002) to examine the parties intent in entering into the stipulation. The hearing officer must first determine whether the language is clear. Among other things, he should look to whether a particular classification is included or excluded.

In this case, the unit language in the stipulation is clear. The parties agreed that full-time and regular part-time cement masons and cement finishers were eligible to vote in the election. There is no reference to “traffic signal specialists” or “traffic signal laborers.” Nor was there any

discussion about those employees prior to the time the stipulation was reached. Indeed, Teegarten admitted that he did not think about including the Traffic Division laborers in the unit until well after the stipulation was negotiated.

If the hearing officer were to find that the unit description in the stipulated election agreement is ambiguous, he should nevertheless find that the Traffic Division laborers are excluded because there was no mutual intent to include them. This is the second prong of the *Caesar's Palace* analysis. 337 NLRB at 1099-1100.

It is clear that the Union's representative, Tom Hardie, had no knowledge of the existence of the Traffic Division laborers at the time the stipulation was accepted. The issue was not brought up by any Employer representative. Hardie reasonably believed that the agreement only applied to those bargaining unit employees covered by the collective bargaining agreement and working full-time as cement finishers. Hardie believed that the reference to regular part-time finishers meant those individuals who were referred out from time-to-time to accept short-term assignments of a day or two.

Teegarten's testimony was consistent with that of Hardie. He confirmed that there was no discussion, and indeed no intention on the part of CS to include other employees, unknown to Hardie, in the bargaining unit. Teegarten admitted that, only after the fact, did CS decide to stack the unit by adding employees who performed minimal cement finishing work, on small projects, and utilizing skills far different from those of employees in the Concrete Structures Division.

Therefore, the hearing officer should conclude, on the basis of the parties' intent *at the time the stipulation was finalized*, that the challenges to the ballots of Hill, Potts, Perkins

and Moreno should be sustained because there was no intent to include them in the bargaining unit.

If the hearing officer is unable to ascertain the parties' intent, he must proceed to the third prong of the *Caesar's Palace* test, the application of traditional community of interest standards. 337 NLRB at 1100. Those criteria include distinctions in the skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, differences in wages, hours and benefits, integration of operations, interchange and contact. *United Operations, Inc.*, 338 NLRB 123 (2002). In this case, there is a complete absence of any of those factors.

The Company operates a highly segregated divisional structure. Each division has its own line of management and supervision. Concrete Structures employees are supervised by separate managers and supervisors. There is absolutely no interchange of employees. The skills and functions of the particular employee groups are highly distinct and diverse. There are substantial differences in wages and fringe benefits. Indeed, Traffic Signal employees operate under an entirely different scheme of wages, and benefits. Their health insurance program requires significant out-of-pocket expenditures for individual coverage. The available retirement program does not kick in until an employee makes wage deferrals. By contrast, employees in the Concrete Structures Division receive higher hourly wages, Employer paid family health insurance coverage, regular contributions to a pension fund and other benefits and working conditions provided for under the collective bargaining agreement.

Under the *Caesar's Palace* analysis, the hearing officer need look no further than the utter absence of any community of interest among these employees. They never met, they never worked together, they possess entirely different skills, and they operate under entirely different

wages, benefits and working conditions. Hiring and supervision are conducted within the respective divisions. For those reasons alone, the challenges to the ballots of Hill, Moreno, Potts and Perkins should be sustained.

b) None of the Traffic Signal Employees Were Dual -Function Employees

CS contended at the hearing that Potts, Perkins, Moreno and Hill should be included in the bargaining unit because they are part-time employees. For reasons, which will be discussed more fully herein, Perkins, Potts, Moreno and Hill were not “regular part-time cement masons and finishers.” On the contrary, they were full-time employees who performed a variety of functions, one of which involved some incidental and minor cement finishing work of the type performed by Polanco, Puebla and Retana. The fact of the matter is that each of those individuals is a full-time employee and the rules for part-time employees, including the “4 hour rule” so conveniently cited by Teegarten, clearly do not apply to them.<sup>2</sup>

The pertinent question is whether these employees qualify as dual-function employees. The Board has grappled with that concept on many occasions, and there are several common threads among the cases. First, once the Union makes a prima facie showing that employees do not qualify as dual-function employees, which the Union has done in this case, the burden shifts to the Employer to show that the employees are performing similar work for sufficient periods of time to demonstrate “a substantial interest in the unit’s wages, hours and conditions of employment.” *Harold J. Becker Company, Inc.*, 343 NLRB 51 (2004). To sustain the burden, the Employer must show that the employees perform similar functions and that they work a sufficient amount of time have an interest in the working conditions of unit employees. Vague

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<sup>2</sup> The “4 hour rule” which holds that a part-time employee who works in the unit for an average of four hours per week may vote in an election does not apply to dual function employees. *Syracuse University*, 321 NLRB 362 (1997); *Martin Enterprises, Inc.*, supra. 325 NLRB at 715. Instead the Board utilizes the *Berea Publishing* standard.

and inclusive documents which fail to establish the type or amount of work performed by disputed individuals is not sufficient. *Harold J. Becker*, 343 NLRB at 52. *Manhattan Construction Company*, 298 NLRB 501, 502 (1990).

The employee skills are not “similar” if they are limited to relatively unskilled functions and only a small fraction of the duties performed by skilled craft employees. *Landing Construction Company*, 273 NLRB 1288 (1984) (employees who performed routine plumbing repairs not included in plumbers unit); *WLVI, Inc.*, 349 NLRB 683, 685-686 (2007) (video journalist who acted as a reporter, but who performed incidental video recording work not included in unit of video technicians. “That the video journalist uses a camera to augment his reporting duties does not mean that he performs significant unit duties.”) *United Operations, Inc.*, supra, 318 NLRB 123, 124 (field service employees who performed minor HVAC repair not included in skilled craft unit of HVAC technicians); *Martin Enterprises, Inc.* 325 NLRB 714 ((1998) (truck driver who performs sporadic equipment operation, at most 10% of the time, while generally performing truck driving duties, was not a dual function employee eligible to vote in operators election.), *Davis Transport, Inc.*, 169 NLRB 557, 562-563 (1993) (employee who spent up to 25% of his time driving a truck not included in unit of drivers because he was engaged in “a different type of driving” and he was paid on a different basis).

With respect to the issue of the amount of time necessary to establish credentials as a dual-function employee, the Board has not applied a hard and fast rule. However, several Board decisions support the Union’s position that an employee performing some incidental unit work- at most, 10 to 15% of the time, is not a dual function employee. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, N.3 (2003) (employee estimated to have performed unit work between 15% and 25% of his time not eligible to vote as a dual-function employee); *Manhattan*

*Construction Company*, 298 NLRB 501, 502 (employee who performed an estimated 5% to 10% bargaining unit work, not a dual function employee.)

In *Davis Transport, Inc.*, supra, 169 NLRB, at 562-563 the Board found that employees who performed up to 25% of their time performing truck driving duties should not be included in the unit because “it was a type of driving which was different from that of the drivers in the unit and paid on a different basis.” Those employees were not included in the unit as dual function employees. *Davis* also stands for the proposition that employees must be performing *identical* functions (emphasis supplied). 169 NLRB at 563.

In a case bearing remarkable similarities to ours, *Continental Cable Vision of St. Louis County*, 298 NLRB 973 (1990), a union petitioned for a unit of full and part-time cable television installers/technicians. The employer sought to include salesmen who performed minor installation functions as part of their duties. Those installations generally involved significantly lesser skills and expertise than those possessed by full-time installer/technicians. The Board found that the duties performed by sales representatives/installers “are merely incidental to their primary responsibility of procuring sales, without which they would perform no installations whatsoever. *Id* at 975. The Board has consistently held that where individuals perform incidental functions which are similar to those performed by skilled craft employees, those employees should not be included in the unit. *Dick Kelchner Excavating Co.*, 236 NLRB 1414-1415 (1978).

Also instructive are cases which define skilled craft units. The Board recognizes such units where evidence demonstrates that employees participate in formal training or apprenticeship programs, where employees possess special skills which require expertise, training, independent judgment and lack of significant supervision, where the employer assigns

work according to craft or jurisdictional lines, and where employees share a common interest with other craft employees, such as wages, benefits and cross-training. *Burns and Roe Services*, 313 NLRB 1307, 1308 (1994); *Dick Kelchner Excavating Co.*, *supra*, 236 NLRB at 1414; *Employing Plasterers Association*, 118 NLRB 17 (1957).

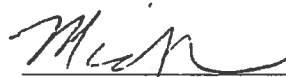
Here, the work of a full-time cement finisher differs significantly from that of the incidental work performed by traffic signal laborers. While the traffic signal laborers perform some work recognized as cement finisher work, they do so on an irregular basis, the jobs are small and require considerably less skills, and the traffic signal laborers do not do not utilize the full range of skills and specialized tools and equipment regularly utilized by the cement finishers in the Concrete Structures Division. Moreover, there is a clear diversity of interests: separate supervision, separate divisional structures, significantly different skills and job duties; and, wide disparities in wages, benefits and working conditions.

#### **IV. CONCLUSION**

For the foregoing reasons, Hill, Moreno, Potts and Perkins do not meet the criteria to be considered dual-function employees. The challenges to their ballots should be sustained. The ballots of Polanco, Puebla and Retana should be counted, and the Union should be certified as the collective bargaining representative for the craft unit consisting of full and regular part-time cement masons/finishers.

Respectfully submitted this 24<sup>th</sup> day of July, 2012.

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